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13 UNITED STATES DISTRICT COURT FOR

14 THE EASTERN DISTRICT OF CALIFORNIA

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 16 THOMAS E. PEREZ, Secretary ) Case No.  
 of Labor, UNITED STATES )  
 DEPARTMENT OF LABOR, )  
 17 ) **COMPLAINT FOR VIOLATIONS OF**  
 Petitioner, ) **ERISA**  
 18 )  
 19 v. )  
 )  
 20 BUTTE STEEL & FABRICATION, )  
 INC., a California corporation; )  
 21 JEFFREY BROCHHEUSER, an )  
 individual; and the BUTTE STEEL )  
 & FABRICATION, INC. )  
 22 401(k)PROFIT SHARING PLAN, an )  
 employee pension benefit plan. )  
 23 )  
 24 Defendants. )  
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 27 Plaintiff THOMAS E. PEREZ, Secretary of Labor, United  
 28 States Department of Labor (the "Secretary"), alleges:

1 1. This cause of action arises under Title I of the  
2 Employee Retirement Income Security Act of 1974 ("ERISA"), as  
3 amended, 29 U.S.C. §§ 1001-1191c, and is brought by the  
4 Secretary under ERISA §§ 502(a)(2) and (5), 29 U.S.C. §§  
5 1132(a)(2) and (5), to enjoin acts and practices which violate  
6 the provisions of Title I of ERISA, to obtain appropriate  
7 equitable relief for breaches of fiduciary duty under ERISA §  
8 409, 29 U.S.C. § 1109, and to obtain such further relief as may  
9 be appropriate to redress and to enforce the provisions of Title  
10 I of ERISA.

11 **JURISDICTION AND VENUE**

12 2. This court has jurisdiction over this action pursuant  
13 to ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1).

14 3. Venue of this action lies in the Eastern District of  
15 California, pursuant to ERISA § 502(e)(2), 29 U.S.C. §  
16 1132(e)(2), because the BUTTE STEEL & FABRICATION, INC.  
17 401(k)PROFIT SHARING PLAN was administered within the District,  
18 the fiduciary breaches at issue took place within the District,  
19 and Defendant JEFFREY BROCHHEUSER resides within the District.

20 **DEFENDANTS**

21 4. The BUTTE STEEL & FABRICATION, INC. 401(k)PROFIT  
22 SHARING PLAN (the "Plan" or "401(k) Plan") is an employee  
23 benefit plan within the meaning of ERISA § 3(3), 29 U.S.C. §  
24 1002(3), and is subject to the provisions of Title I of ERISA  
25 pursuant to ERISA § 4(a), 29 U.S.C. § 1003(a). The 401(k) Plan  
26 is named as a Defendant herein pursuant to Rule 19(a) of the  
27 Federal Rules of Civil Procedure, solely to assure that complete  
28 relief can be granted.

1 5. At all relevant times, Defendant BUTTE STEEL &  
2 FABRICATION, INC. ("Butte Steel" or "the Company"), a California  
3 corporation, was the sponsor and Plan Administrator of the  
4 401(k) Plan, a fiduciary of the Plan within the meaning of ERISA  
5 § 3(21)(A)(i) and (iii), 29 U.S.C. § 1002(21)(A)(i) and (iii),  
6 and a party in interest to the Plan within the meaning of ERISA  
7 § 3(14)(A) and (C), 29 U.S.C. § 1002(14)(A) and (C).

8 6. At all relevant times, Defendant JEFFREY BROCHHEUSER,  
9 president and owner of Butte Steel and named trustee of the  
10 Plan, was and is a fiduciary of the Plan within the meaning of  
11 ERISA § 3(21)(A)(i) and (iii), 29 U.S.C. § 1002(21)(A)(i) and  
12 (iii), and parties in interest to the Plan within the meaning of  
13 ERISA § 3(14)(A), (E) and (H), 29 U.S.C. § 1002(14)(A), (E) and  
14 (H). Jeffrey Brochheuser resides in or around Durham,  
15 California.

16 **ALLEGATIONS: FAILURE TO REMIT EMPLOYEE CONTRIBUTIONS AND**  
17 **LOAN REPAYMENTS TO THE PLAN AND FAILURE TO TIMELY REMIT EMPLOYEE**  
18 **CONTRIBUTIONS AND LOAN REPAYMENTS TO THE PLAN**

19 7. Paragraphs 1 through 6 above are re-alleged and  
20 incorporated herein by reference.

21 8. Butte Steel established the 401(k) Plan effective  
22 January 1, 1995. The Plan was established to provide benefits  
23 to its employees upon retirement, death or disability.

24 9. The 401(k) Plan's governing documents, which were  
25 adopted by the Company, provide in pertinent part that  
26 participants could make salary reduction contributions to the  
27 Plan and that such deferred amounts would be contributed to the  
28 Plan and allocated to the individual participants' accounts.  
The Plan's governing documents also permit an individual

1 participant to borrow money from his or her 401(k) account  
2 balance. The participant may repay the loan through salary  
3 reduction contributions to the Plan.

4 10. Department of Labor regulations provide that the  
5 employee contributions be remitted to the Plan as of the  
6 earliest date on which such contributions can reasonably be  
7 segregated from an employer's general assets. 29 C.F.R.  
8 § 2510.3-102. Based on a review of the Company's demonstrated  
9 patterns and practices, the employee contributions could have  
10 been reasonably segregated from Butte Steel's assets and  
11 remitted to the Plan within four business days.

12 11. During the period from July 1, 2010 to August 16,  
13 2012, Jeffrey Brochheuser caused Butte Steel to withhold at  
14 least \$28,881.90 from employees' pay for salary reduction  
15 contributions to the 401(k) Plan and at least \$3,065.90 in  
16 employees' pay for loan repayments to the 401(k) Plan, but  
17 failed to remit the amounts so withheld into the 401(k) Plan's  
18 accounts, and instead, retained and commingled the withheld  
19 contributions in Company accounts.

20 12. During the period from January 16, 2009 to June 30,  
21 2010, Defendants Butte Steel and Jeffrey Brochheuser failed to  
22 timely remit at least \$52,139.49 from employees' pay for salary  
23 reduction contributions and at least \$11,974.39 in employees'  
24 pay for loan repayments to the 401(k) Plan that were withheld  
25 from employee pay. These employee contributions and loan  
26 repayments were retained by Defendant Butte Steel beyond the  
27 amount of time in which they could have been reasonably  
28 segregated (four business days) and became commingled in Company

1 accounts before they were untimely remitted to the Plan,  
2 resulting in lost opportunity costs to Plan participants.

3 13. As the discretionary trustee for the Plan, Jeffrey  
4 Brochheuser was responsible for ensuring that that the employee  
5 salary reductions and loan repayments described in paragraphs 11  
6 and 12 above were timely remitted to the Plan. Jeffrey  
7 Brochheuser failed to monitor the Plan and failed to ensure  
8 these amounts were timely remitted, or remitted at all, to the  
9 Plan.

10 **VIOLATIONS OF ERISA**

11 14. Paragraphs 1-13 above are re-alleged and incorporated  
12 herein by reference.

13 15. By the conduct described in paragraphs 11 through 13  
14 above, Defendants Butte Steel and Jeffrey Brochheuser, acting in  
15 their fiduciary capacities:

16 a. failed to hold the assets of the 401(k) Plan in a  
17 trust in violation of ERISA § 403(a), 29 U.S.C. § 1103(a);

18 b. permitted the assets of the 401(k) Plan to inure  
19 to the benefit of the Company, in violation of ERISA  
20 § 403(c)(1), 29 U.S.C. § 1103(c)(1);

21 c. failed to act solely in the interest of the  
22 participants and beneficiaries of the 401(k) Plan and for the  
23 exclusive purpose of providing benefits to participants and  
24 their beneficiaries and defraying reasonable expenses of 401(k)  
25 Plan administration, in violation of ERISA § 404(a)(1)(A), 29  
26 U.S.C. § 1104(a)(1)(A);

27 d. failed to act with care, skill, prudence, and  
28 diligence under the circumstances then prevailing that a prudent

1 person acting in a like capacity and familiar with such matters  
2 would use in the conduct of an enterprise of a like character  
3 and with like aims, in violation of ERISA § 404(a)(1)(B), 29  
4 U.S.C. § 1104(a)(1)(B);

5 e. failed to act in accordance with the documents  
6 and instruments governing the plan as required by ERISA  
7 § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D);

8 f. caused the 401(k) Plan to engage in transactions  
9 which they knew or should have known constituted a direct or  
10 indirect lending of money or other extension of credit between  
11 the Plan and a party in interest, in violation of ERISA  
12 § 406(a)(1)(B), 29 U.S.C. § 1106(a)(1)(B);

13 g. caused the 401(k) Plan to engage in transactions  
14 which they knew or should have known constituted a direct or  
15 indirect transfer to, or use by or for the benefit of, a party  
16 in interest, of assets of the Plan, in violation of ERISA  
17 § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D); and

18 h. dealt with assets of the Plan in their own  
19 interests and acted on behalf of a party whose interests are  
20 adverse to the interests of the Plan or the interests of its  
21 participants and beneficiaries, in violation of ERISA §  
22 406(b)(1) and (2), 29 U.S.C. § 1106(b)(1) and (2).

23 16. As a direct and proximate result of the breaches of  
24 fiduciary duties committed by the Company and Jeffrey  
25 Brochheuser, as described in paragraphs 11 to 13 above, the  
26 401(k) Plan has suffered losses, including lost opportunity  
27 income, for which the Defendants are jointly and severally  
28 liable pursuant to ERISA § 409, 29 U.S.C. § 1109.

1 17. Defendant Jeffrey Brochheuser is liable as a co-  
2 fiduciary pursuant to ERISA § 405(a), 29 U.S.C. § 1105(a), for  
3 the violations alleged in paragraph 15 above because (1) he  
4 knowingly participated in, or knowingly undertook to conceal,  
5 acts or omissions, of Defendant Butte Steel, knowing such acts  
6 or omissions were breaches; (2) he enabled Defendant Butte Steel  
7 to commit such breaches by his failure to comply with  
8 §§ 404(a)(1)(A) and (B), 11 U.S.C. §§ 1104(a)(1)(A) and (B), in  
9 the administration of his specific responsibilities which gave  
10 rise to his status as a fiduciary; and/or (3) he had knowledge  
11 of Defendant Butte Steel's breaches and failed to make  
12 reasonable efforts under the circumstances to remedy such  
13 breaches.

14 18. Defendant Butte Steel is liable as a co-fiduciary  
15 pursuant to ERISA § 405(a), 29 U.S.C. § 1105(a), for the  
16 violations alleged in paragraph 15 above because (1) it  
17 knowingly participated in, or knowingly undertook to conceal,  
18 acts or omissions, of Defendant Jeffrey Brochheuser, knowing  
19 such acts or omissions were breaches; (2) it enabled Defendant  
20 Jeffrey Brochheuser to commit such breaches by its failure to  
21 comply with §§ 404(a)(1)(A) and (B), 11 U.S.C. §§ 1104(a)(1)(A)  
22 and (B), in the administration of its specific responsibilities  
23 which gave rise to its status as a fiduciary; and/or (3) it had  
24 knowledge of Defendant Jeffrey Brochheuser's breaches and failed  
25 to make reasonable efforts under the circumstances to remedy  
26 such breaches.

27 **PRAYER FOR RELIEF**

28 WHEREFORE, the Secretary prays for judgment:

1 A. Ordering Defendants Butte Steel and Jeffrey  
2 Brochheuser to restore to the 401(k) Plan any losses, including  
3 lost opportunity costs, resulting from fiduciary breaches  
4 committed by them or for which they are liable;

5 B. Ordering Defendants Butte Steel and Jeffrey  
6 Brochheuser to correct the prohibited transactions in which they  
7 engaged or in which they caused the Plan to engage;

8 C. Permanently enjoining Defendants Butte Steel and  
9 Jeffrey Brochheuser from violating the provisions of Title I of  
10 ERISA;

11 D. Permanently enjoining Defendant Jeffrey Brochheuser  
12 from serving as a fiduciary of, or service provider, to any  
13 ERISA-covered employee benefit plan and removing him from any  
14 position that he now holds as fiduciary of the Plan;

15 E. Appointing an independent fiduciary to distribute the  
16 401(k) Plan's assets to the participants and beneficiaries,  
17 terminate the 401(k) Plan, and conclude any Plan-related matters  
18 connected with the proper termination of the Plan;

19 F. Requiring the Defendants to pay for all costs  
20 associated with the appointment and retention of the independent  
21 fiduciary;

22 G. Requiring the Defendants to cooperate with the  
23 independent fiduciary;

24 H. Awarding the Secretary the costs of this action; and

25 I. Ordering such further relief as is appropriate and  
26 just.

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Dated: January 14th, 2015

M. PATRICIA SMITH  
Solicitor of Labor

JANET M. HEROLD  
Regional Solicitor

DANIELLE L. JABERG  
Counsel for ERISA

IAN H. ELIASOPH  
Counsel for ERISA

By: /s/ Seema N. Patel  
SEEMA N. PATEL  
Trial Attorney

Attorneys for Thomas E. Perez

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS: Thomas E. Perez, Secretary of Labor, United States Department of Labor. (b) County of Residence of First Listed Plaintiff: (EXCEPT IN U.S. PLAINTIFF CASES). (c) Attorneys (Firm Name, Address, and Telephone Number): Seema N. Patel, Office of the Solicitor, U.S. Department of Labor, 90 7th Street, Ste. 3-700, San Francisco, CA 94103, (415) 625-7741. DEFENDANTS: Butte Steel & Fabrication, Inc., Jeffrey Brochheuser, The Butte Steel & Fabrication, Inc. 401(k) Profit Sharing Plan. County of Residence of First Listed Defendant: Butte County. NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED. Attorneys (If Known): Frederick H. Schill (Atty for J. Brochheuser), Suite 300, 2068 Talbert Drive, Chico, CA 95928, (530) 521-5426; Douglas B. Jacobs (Atty for Butte Steel & Fab., Inc.), 20 Independence Circle, Chico, CA 95928, (530) 342-6144.

II. BASIS OF JURISDICTION (Place an "X" in One Box Only). III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant). Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship and incorporation status. Includes categories like U.S. Government Plaintiff/Defendant, Federal Question, Diversity, Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, and Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only). Grid of categories: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Each category contains a list of specific legal claims with checkboxes.

V. ORIGIN (Place an "X" in One Box Only). 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District (specify), 6 Multidistrict Litigation.

VI. CAUSE OF ACTION. Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): Employee Retirement Income Security Act of 1974, §§ 1001-1191c (ERISA). Brief description of cause: Violation of Title I of Employee Retirement Income Security Act (ERISA).

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE DOCKET NUMBER

DATE: 01/14/2015 SIGNATURE OF ATTORNEY OF RECORD: /s/ Seema N. Patel

FOR OFFICE USE ONLY: RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

Case 2:15-cv-00118-MCE-KJN Document 1-1 Filed 01/14/15 Page 2 of 2  
**INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44**

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I. (a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
- United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
- United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
- Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
- Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an "X" in one of the six boxes.
- Original Proceedings. (1) Cases which originate in the United States district courts.
- Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
- Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
- Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
- Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
- Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
- Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
- Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

**Date and Attorney Signature.** Date and sign the civil cover sheet.